UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ARBAH HOTEL CORP. d/b/a
MEADOWLANDS VIEW HOTEL

and

Cases 22-CA-257539
22-CA-259975

NEW YORK HOTEL AND
MOTEL TRADES COUNCIL, AFL-CIO

POST-HEARING BRIEF OF ARBAH HOTEL CORP. FOR THE NATIONAL LABOR RELATIONS BOARD HEARING OF JANUARY 20-21, 2021

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PRELIMINARY STATEMENT

Arbah Hotel Corp. d/b/a Meadowlands View Hotel ("Arbah" or the "Hotel") hereby submits this post-hearing brief in connection with the hearing for the charges brought by the General Counsel and New York Hotel and Motel Trades Council, AFL-CIO (the "Union") dated June 5, 2020. The charges alleged violation of NLRA [A] § 8(a)(1) and (3) for discharge of bargaining unit employees based on protected concerted activity; and [B] § 8(a)(1) and (5) for unilaterally changing the terms and conditions of employment and withdrawing recognition of the Union. As demonstrated at the hearing on January 20 and 21, 2021, there was no credible evidence to support the charges against Arbah and the actions of the employer were taken as a matter of business necessity in the face of the emerging international pandemic. Therefore, no finding of violations against Arbah is warranted.

FACTUAL BACKGROUND

For the sake of brevity and to avoid repetition, Arbah incorporates by reference the facts contained in the Proposed Findings of Fact submitted along with this brief. Those facts, and the facts set forth herein, were elicited during the two-day hearing which took place before Hon. Jeffrey Gardner, A.L.J.

The General Counsel ("GC") presented as the factual basis for the charges the broad layoffs of employees (union and non-union) implemented by Arbah beginning on February 29, 2020. The GC and the charging party, the Union, contended that the layoffs were discriminatory and targeted at bargaining unit employees and taken in retaliation against the protected activity by those employees. As demonstrated by the evidence, the layoffs were in response to the precipitous drop in business activity and sales for Arbah in January and February 2020 and forecasted occupancy figures for the remainder of 2020, attributable to the international COVID-19 pandemic. The drastic economic downturn presented an emergency for Arbah and most others in the hotel business faced with a mounting deficit between dwindling sales and regular expenses such as payroll and operating costs. The hospitality industry was devastated by the pandemic and corresponding shelter-in-place orders of the governor of New Jersey.

As of March, 2020, Arbah's sales had dropped more than 90% compared to 2019's sales figures. The Meadowlands View Hotel experienced significant decline in occupancy over the first three months of 2020 with average occupancy at significantly less than 15% of the Hotel's capacity of 7,500 rooms per month. The average occupancy decreased even more after March 1, 2020 to the point where the Hotel had, on average, no more than five rooms occupied per night by mid-2020. The decision to implement layoffs was driven by business necessity and not by discrimination or any other prohibited purpose. The employees were notified of the layoffs by letter provided by the Hotel on February 29, 2020.

Arbah also terminated the positions of many management and non-union employees around this time. The layoffs were carried out as a cost-saving measure and an expedited response to the market changes and the realities of the pandemic, which imposed significant restrictions on the Hotel's operations. Specifically, Arbah terminated several non-union employees at the front desk and management members of the maintenance and laundry departments.

As of February 29, 2020, Arbah elected to bring on independent contractors to fill the diminished needs for services at the Hotel on a limited basis. By using independent contractors, Arbah was more flexible in its ability to fill its needs without having to continue to pay full payroll and operating expenses (more than $100,000 per month) as though it were not in the face of a completely unique and dire situation. Arbah's use of independent contractors lasted only several weeks as sales dropped dramatically in early March following the Governor's directive.

As of mid-March 2020, Arbah had very few employees on site at a given time. This is due to the fact that the Hotel averaged fewer than five rooms occupied per night since March 13, 2020. Arbah has been unable to pay wages for employees (Union or non-union) aside from minimal coverage.

As stated in the termination notice, the employer cited "market demands" and "profitability issues" as the bases for its decision. (February 29th Letter). Under the circumstances since early 2020, the Hotel suffered dramatic losses in business income. That reality has dictated an emergent and drastic response from Arbah. Clearly, the business could not operate in late February as it had prior to that time. The decision was one of necessity taken in an effort to preserve the going concern of the business.

Per a release from the Department of Labor, the conditions facing Arbah are not unique:

> In the week ending March 21, the advance figure for seasonally adjusted initial (unemployment) claims was 3,283,000, an increase of 3,001,000 from the previous week's revised level. This marks the highest level of seasonally adjusted initial claims in the history of the seasonally adjusted series.

(Respondent, Exh. "1").

Other publications quantified the marked negative effect of the pandemic on the hotel industry in early 2020. The Oxford Economics American Hotel & Lodging Association issued a report stating that the hotel industry "is facing an abrupt and unprecedented drop in hotel demand that is gaining pace and getting progressively deeper and more severe week by week". (Respondent Exh. "2"). That report found that nearly 4 million hotel industry employees are projected to lose their jobs or have already been furloughed. (Id.). The statewide "shelter in place" order has corresponded to steep declines in occupancy, which translates to significant lost revenue.

Arbah's paltry occupancy figures and its payroll obligations highlight the deep losses incurred by the business on a monthly basis beginning in 2020. Those totals are as follows:

Occupancy Totals[1]

Month, 2020	Total Occupancy	Average/ Night	Revenue
January	1143	37	$ 90,736
February	1109	38	89,813
March	695	22	60,345
April	153	5	16,089
May	163	5.4	18,890
June	255	8.5	28,480
July	225	7.25	23,698
August	229	7.3	25,801
September	276	9.2	26,066
October	220	7	20,159
November	217	7.2	21,125
December	173	5.5	17,117

Total room receipts April-December, 2020 = $ 197,425

Average receipts per month (April-December, 2020) = $ 21,936.11

(Respondent Exh. "3" and "4"; Wysocki testimony).

The corresponding payroll figures show that the Hotel barely took in enough in revenue to satisfy payroll during 2020, with significant other costs such as taxes, maintenance and utilities not included. Arbah's payroll was shown to be as follows:

[1] These figures are taken from monthly forecast reports and are based on the scheduled rooms booked for occupancy. As Wysocki testified, the actual figures of rooms occupied are less than those shown as reserved on this table.

Payroll

December 2019 – March, 2020	$	345,755
Average monthly payroll	$	86,438
April-December, 2020	$	200,224
Average monthly payroll	$	22,247.

(Respondent Exh. "5"; Wysocki testimony).

The assertion that Arbah took these steps in retaliation against the Union must be viewed in light of the fundamental changes to the industry since February, 2020 and the fact that all employees, regardless of union affiliation were impacted. Arbah took these actions not by choice but by necessity dictated by the effects of the pandemic. Management was also impacted as the vast majority of staff was laid off.

Importantly, the economic environment also renders injunctive relief unwarranted and baseless. Were a Court to direct Arbah to rehire the laid-off employees, the order would require Arbah to keep its employees despite the fact that virtually every hotel is in the midst of large layoffs. To direct Arbah to reinstate employees would be an order ignoring the realities of the present pandemic.

ARGUMENT

I. ARBAH DID NOT VIOLATE THE ACT BY IMPLEMENTING LAYOFFS BECAUSE THE ACTION WAS A MATTER OF BUSINESS NECESSITY AND NOT DISCRIMINATORY OR RETALIATORY

A. Business Necessity

At the hearing of January 20th and 21st, the GC failed to prove that Arbah's decision to lay off employees was undertaken as a punitive tactic to threaten the bargaining process. No facts were offered to show that the layoffs were implemented because of "protected concerted activity" by the Union or that there was discrimination based on NLRB activity. Instead, the pertinent facts suggest that the employer's action was the product of the new reality that decimated the hospitality industry in the State and largely halted sales revenue for hotels.

The charge that the Hotel has discriminated against the Union in enacting the layoffs is unfounded. Indeed, Arbah laid off most of its employees, including non-union workers because of the significant loss of sales and income. Arbah currently has fewer than five employees because it is unable to make payroll in the face of greatly diminished sales. (Respondent Exh. "3" and "4"). Those affected by the layoffs include members of senior management at the Hotel. The layoffs were the product of the historic shift in the economics in the industry and throughout the country largely based on the pandemic. (Respondent Exh. "1" and "2"). It was that economic environment, and not any intentional, targeted action by Arbah that caused the change in the terms and conditions for the Union and non-union employees.

Arbah's records show that the Hotel saw a significant drop in sales beginning in January, 2020. (Respondent Exh. "3" and "4"). The Hotel averaged less than 15% occupancy (based on its total of 250 rooms) per night over the past month. (Id). A significant portion of the Hotel's business has always been tourists, including international guests. The Hotel has had only sparse advanced reservations and many more cancellations of previous reservations. Nearly every source of revenue and sales, upon which the Hotel previously relied in setting its monthly and annual staffing levels and budget, dissolved. No specific evidence was presented to show that the layoffs were implemented for any reason other than as a measure to preserve the viability of the business, i.e., economic necessity.

Following the layoffs on February, 29, 2020, Arbah retained independent contractors as a stop-gap emergency measure, a business decision, in an attempt to wind down the business operations. After only several weeks, that measure proved to be futile as the Hotel's sales were unable to support even the reduced staffing. In essence, the entire staff for the Hotel was terminated due to the inability of the employer to support the cost of payroll. Arbah did not "unilaterally" change the conditions of employment for the Union members. The pandemic changed the conditions for all businesses but mostly for hotels. The analysis of whether reasonable cause exists to find an unfair labor practice requires recognition of the economic realities created by the pandemic.

The GC argues that the layoffs were motivated by discriminatory or retaliatory animus against the Union. The testimony at the hearing did not support that assertion and the evidence clearly backed Arbah's position that the layoffs were an act of business necessity brought about by a steep decline in business over a period of several months prior to the decision to implement the layoffs. (Respondent Exh. "3" and "4"). In short, the record demonstrates that the Hotel was operating at less than 10% capacity and that its operating costs, including payroll, greatly exceeded its revenue. In addition, the exhibits and testimony showed that the forecast for occupancy was greatly reduced from prior years as many reservations had been canceled for 2020. (Respondent Exh. "3" and "4"; Wysocki testimony).

Arbah acted out of business necessity under the circumstances, and had no duty to bargain prior to the layoffs. The presumption that the subject is one of mandatory bargaining can be overcome "if it appears that the employer's interests outweigh the union's interests in a given situation." Equitable Gas Co. v. N.L.R.B., 637 F.2d 980, 987 (3d Cir. 1981), citing Electrical Products Div. of Midland-Ross Corp. v. N.L.R.B., 617 F.2d 977, 982-983 (3d Cir. 1980), cert. denied, 449 U.S. 871 (1980). It requires an analysis of the facts specific to this case.

Economic necessity is a legitimate, nondiscriminatory reason for employment decisions. See Kelly v. Drexel University, 907 F. Supp. 864, 875 (E.D. Pa. 1995), aff'd 94 F.3d 102 (3d Cir. 1996); see also Dolence v. United States Nat'l Bank, 797 F. Supp. 423, 425 (W.D. Pa. 1992) (evidence of financial losses during one year and greater projected losses for the coming year), *aff'd mem.*, 975 F.2d 1549 (3d Cir. 1992).

An "employer does not violate sections 8(a)(3) and (1) by discontinuing a part of its business and laying off employees if the action is motivated solely by economic considerations." N.L.R.B. v. Eagle Material Handling, Inc., 558 F.2d 160, 169 (3d Cir. 1977), citing N.L.R.B. v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 829 (7th Cir. 1976). A decision, involving a change in the scope and direction of the enterprise, is similar to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." First Nat. Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 677, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981), citing Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 223, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) (STEWART, J., concurring). There is no evidence that the decision to implement layoffs was governed by anything other than economic necessity in the face of a national emergency, which amounts to an act of God.

In Equitable Gas the Court highlighted that the employer's decision to subcontract its remittance work was wholly governed by economic concerns looking toward increased efficiencies and increased, as well as accelerated, cash flow. The same factors motivated Arbah's decision to lay off its employees. The Hotel has experienced a drop of approximately 90% in sales/occupancy in the first part of 2020. At present, the Hotel is averaging occupancy of less than 5% occupancy of its 250 rooms per night. Its sales, and the prospect of future sales as indicated by reservations, do not allow Arbah to meet payroll.

In N.L.R.B. v. Royal Plating and Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965), it was held that "an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down". Arbah was faced with a similar decision as a hotel in the current national climate. The evidence demonstrated that Arbah experienced an historical decline in its business based on the ongoing pandemic. (Respondent Exh. "3" and "4"; Wysocki testimony). The downturn presented the Hotel with no choice in order to preserve the potential viability of the business. As such, there was no clear showing of an unfair labor practice under the facts on the record.

The exhibits at the hearing support Arbah's position that the layoffs were borne out of business necessity. In the months immediately leading up to the layoff decision, Arbah had significantly reduced occupancy figures. The Hotel occupied approximately 30 rooms per night during the months of January and February, representing less than 15% occupancy. (Respondent, Exh. "3" and "4"). At those figures, which were shown to be much less than the occupancy levels of 2019, the Hotel took in less than the amount needed to pay only payroll, excluding taxes, utilities and other expenses. The same forecast documents indicated that future occupancy would be limited due to the lack of reservations and a great number of cancellations. The decision to implement layoffs was made in the context of this reduced occupancy.

Moreover, the evidence at the hearing showed that average monthly payroll as of early, 2020 was at least $90,000. (Respondent Exh. "5"). At 15% occupancy, the Hotel was unable to pay its monthly payroll at full staffing levels. For each month from December, 2019 to February, 2020, the Hotel experienced a substantial deficit and monthly losses in its operations. There was no testimony to dispute that fact or the fact that occupancy and revenue levels actually continued to decrease thereafter as projected by the Arbah forecasts. Arbah's average monthly revenue after the layoffs was slightly less than $22,000. (Respondent Exhs. "3" and "4"). After the layoffs, the Hotel's average monthly payroll was just over $22,000. (Respondent Exh. "5"). The evidence supported Arbah's position that the layoffs were carried out due to business necessity and the business's attempt to restructure in order to handle the challenges posed by the economic downturn in the industry.

The business necessity argument was also supported by the market analysis documents made part of the record at the hearing. Per a release from the Department of Labor, the conditions facing Arbah in early 2020 were not unique:

> In the week ending March 21, the advance figure for seasonally adjusted initial (unemployment) claims was 3,283,000, an increase of 3,001,000 from the previous week's revised level. This marks the highest level of seasonally adjusted initial claims in the history of the seasonally adjusted series.

(Respondent Exh. "1").

Other publications have quantified the once-in-a-lifetime negative effect of the pandemic on the hotel industry. The Oxford Economics American Hotel & Lodging Association issued a report from March, 2020 stating that the hotel industry was "facing an abrupt and unprecedented drop in hotel demand that is gaining pace and getting progressively deeper and more severe week by week". (Respondent Exh. "2"). That report found that as of March, 2020, nearly 4 million hotel industry employees were projected to lose their jobs. (Id.). The business necessity that pushed Arbah to implement layoffs also led countless other businesses to take the same action with respect to hospitality employees.

None of the evidence presented by the GC refuted Arbah's position that the layoffs were the product of business necessity. The exhibits confirmed that Arbah was operating at a significant deficit for months prior to the layoffs and that its revenue did not allow it to pay even payroll. Faced with the prospect of dwindling reservations and anemic occupancy rates, Arbah took action out of business necessity. Therefore, the GC failed to prove that Arbah acted in violation of the Act by instituting layoffs without bargaining.

B. No Discrimination Against the Bargaining Unit Employees

Arbah's decision to hire independent contractors to fill only the specific reduced need for services at the Hotel allowed for flexibility in scheduling to meet its reduced workforce needs. Wysocki testified (and it was supported by the exhibits) that the independent contractors were used only as a stop-gap measure for approximately two weeks while the Hotel essentially closed off portions of its business. (GC Exhs. "28" – "38"). There was no evidence that the contractors were used to replace Union employees or that the contractors performed services on a full-time basis or for a period longer than one month. Arbah brought on contractors in an effort to reduce expenses while substantially modifying its business operations in the face of a global pandemic that continues to destroy the entire hospitality industry.

Most significantly, there was no evidence that retaliation or discrimination was the animus for Arbah's decision. The layoffs impacted numerous employees who were not part of the bargaining unit. These employees included members of management and those in the front desk, whoa re not affiliated with the Union. (GC Exh. "40" – "42"). In fact, by June 1st, 2020, very few employees remained on payroll, which was reduced to less than $20,000 on a monthly basis. (Respondent Exh. "5"). Compared to the payroll from the beginning of 2020, that represents a reduction of nearly $80,000 per month in payroll. The evidence is clear that the layoffs impacted all employees of Arbah and not just the Union. As such, no discriminatory motive or effect has been demonstrated by the GC.

C. Arbah Had No Obligation to Bargain Prior to the Layoffs

The charges alleged a violation of the Act by Arbah's failure to bargain prior to the layoffs. However, the evidence did not support a finding that Arbah had a duty to bargain under these circumstances. It has been held that decisions made out of business necessity may be made without bargaining. See Equitable Gas Co., supra at 987, citing Electrical Products Div. of Midland-Ross Corp. v. N.L.R.B., 617 F.2d 977, 982-983 (3d Cir. 1980), cert. denied, 449 U.S. 871 (1980).

The evidence at the hearing confirmed that the decision was made at a time when Arbah was hemorrhaging money as of the beginning of 2020. The layoffs were dictated by the rising gap between revenue and expenses and the emerging global pandemic. The pandemic was an Act of God for which standard notice and bargaining requirements do not apply. The Hotel was not obligated to drive itself to insolvency while bargaining with the Union before effectuating layoffs. Indeed, by the end of 2020 there were no positions for any employees to occupy at the Hotel.

The GC failed to prove that Arbah had a duty to bargain prior to terminating employees under the conditions in place at the end of February, 2020. Bokerman cited to the expired collective bargaining agreement in support of the Union's position that Arbah was obligated to bargain prior to layoffs. However, as demonstrated on cross-examination, that same expired agreement required no notice to employees prior to termination or other action taken due to an Act of God. (GC Exh. "2").

Because the circumstances were highly unique and categorized as force majeure, there was no obligation to bargain prior to the layoffs, which were undertaken strictly as a matter of business necessity.

II. ARBAH DID NOT REFUSE TO RECOGNIZE THE UNION OR TO ENGAGE IN NEGOTIATIONS AFTER THE LAYOFFS

The GC alleged that Arbah refused to recognize the Union and that it failed to engage in negotiations with the Union after the layoffs. The General Counsel failed to establish either that Arbah withdrew recognition or that there were no negotiations following the actions of February 29, 2019. In fact, to the contrary, the testimony and evidence at the hearing clearly demonstrated that counsel for the employer and the Union communicated on several occasions following the termination of positions by the Hotel. Amy Bokerman, Esq. testified that the Arbah attorney sent several emails to Union counsel in an effort to arrange meetings to discuss the layoffs. (GC 16-25). There was also undisputed testimony at trial that at least two conference calls and one in person meeting took place after the layoffs involving counsel for both parties.

The record evidence, including email exhibits and the testimony of Bokerman and Wysocki established that the hotel has never refused to recognize the Union. (GC Exhs. "19" – "25"). The GC failed to establish that there was a violation of the Act by Arbah in that respect. Finally, the evidence showed that the parties met and exchanged proposals relating to a potential new collective bargaining agreement. (GC Exhs. "43" and "44"). Despite the layoffs, the Hotel continued to meet with the Union concerning the business necessity and a potential new collective bargaining agreement. Thus, there was no refusal to meet or bargain with the Union.

CONCLUSION

For the reasons set forth herein and as presented on the record during the hearing, the charges asserted against Arbah Hotel Corp. by the NLRB and the Union lack credible evidence to support a finding that Arbah violated the Act.

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By: ______________________
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Dated: February 24, 2021

CERTIFICATION OF SERVICE

This is to certify that copies of the Respondent's Post-Hearing Brief to Administrative Law Judge Jeffrey P. Gardner have been duly served via electronic filing on Judge Gardner on February 25, 2021 and on General Counsel and the Charging Party via email on the same date as follows:

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